

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

ALLIANCE SPORTS GROUP, LP,

Plaintiff,

v.

**3:20-CV-95
(FJS/ML)**

**WALTER R. TUCKER ENTERPRISES, LTD.,
d/b/a E-Z RED CO.; and MARK TUCKER,**

Defendants.

APPEARANCES

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SCULLIN, Senior Judge

MEMORANDUM-DECISION AND ORDER

I. BACKGROUND

Plaintiff Alliance Sports Group, LP (hereinafter referred to both as Plaintiff and "ASG") alleges that Defendants committed fraud and fraudulent inducement against it in relation to a

settlement agreement that the parties signed following a prior lawsuit. *See generally* Dkt. No. 68, Second Amend. Compl. In November 2020, Defendants moved to dismiss Plaintiff's complaint, arguing, among other things, that the Court lacked subject-matter jurisdiction because ASG did not have standing to pursue the claims under the settlement agreement since it assigned those claims to other entities referred to as "the Sellers." *See generally* Dkt. No. 69. The Sellers constituted various individuals, companies, and a revocable trust, which owned 96% of a corporation known as Bollinger Industries, Inc. ("BII").¹ BII, in turn, wholly owned two corporations – Bollinger Operating Corporation ("BOC") and Bollinger Holding Corporation ("BHC") – that were the general and limited partners that owned 100% of Plaintiff ASG. ASG is thus a subsidiary of BII.

Through a Stock Purchase Agreement, the Sellers sought to transfer two-thirds of BII's ownership to a third party. However, Section 6.10 of that agreement provides that the Sellers "shall have the exclusive right to, at Sellers' sole cost and expense, take all actions with respect to" this lawsuit, filed by BII and its subsidiary, ASG, against Defendants. *See* Dkt. No. 79 (quoting Dkt. No. 75-2 at § 6.10). In its November 29, 2021 Memorandum-Decision and Order, the Court considered that provision and determined that ASG clearly intended to assign its rights in this litigation against Defendants to the Sellers. *See* Dkt. No. 79. Notwithstanding this conclusion, the Court found that, "[s]ince the Sellers owned 96% of BII, and BII – through BO[C] and BHC – owned Plaintiff ASG, then it follows that Plaintiff merely assigned those rights to itself, or, in other words, it retained them." *See id.* at 8. Having determined that

¹ Specifically, the Sellers include Glenn D. Bollinger, Bobby D. Bollinger, Ron Bollinger, Glenn Bollinger Family Enterprises, Ltd., Bob Bollinger Family Enterprises, Ltd., Randle Bollinger, Richard Bollinger, Vicki Burnett, Carl Liggio, Mary Liggio, and the Maguire Joint Revocable Trust. *See* Dkt. No. 75-2 at 3.

Plaintiff retained its rights and liabilities in this litigation, the Court denied Defendants' motion to dismiss for lack of subject-matter jurisdiction and found that Plaintiff ASG had standing. *See id.* Defendants now move the Court for reconsideration, arguing that the Court committed a "clear error of law" in finding that ASG had standing and that its rights in this litigation did not extinguish upon assignment to the Sellers. *See* Dkt. No. 82.

II. DISCUSSION

"In this district, reconsideration of an order entered by the Court is appropriate upon a showing of '(1) an intervening change in controlling law, (2) the availability of new evidence not previously available, or (3) the need to correct a clear error of law or prevent manifest injustice.'" *Agee v. Mitchell*, No. 9:19-CV-0057 (BKS/ATB), 2019 U.S. Dist. LEXIS 214930, *2 (Dec. 13, 2019) (quoting *In re C-TC 9th Ave. P'ship*, 182 B.R. 1, 3 (N.D.N.Y. 1995)) (other citations omitted). Here, Defendants contend that the Court committed a "clear error of law" in finding that ASG retained certain rights that it assigned to the Sellers because the Sellers were separate legal entities from ASG. *See* Dkt. No. 79 at 8; Dkt. No. 82-2 at 5-7.

"It is essential to an assignment of a right that the [assignor] manifest an intention to transfer the right to another person without further action or manifestation of intention by the [assignor]." *Fed. Treasury Enter. Sojuzplodoimport v. SPI Spirits Ltd.*, 726 F.3d 62, 74 (2d Cir. 2013) (quoting Restatement (Second) Contracts § 324). "An unequivocal and complete assignment extinguishes the assignor's rights against the obligor and leaves the assignor without standing to sue the obligor." *Phillips v. GM LLC (In re Motors Liquidation Co.)*, 689 F. App'x 95, 96 (2d Cir. 2017) (summary order) (quoting *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, Nat'l Ass'n*, 731 F.2d 112, 125 (2d Cir. 1984)) (other citation omitted); *see Clarex Ltd. v.*

Natixis Sec. Am. LLC, No. 12 Civ. 0722 (PAE), 2012 U.S. Dist. LEXIS 147485, *15-*17 (S.D.N.Y. Oct. 12, 2012); *Amusement Indus. v. Stern*, No. 07 Civ. 11586 (LAK) (GWG), 2011 U.S. Dist. LEXIS 150050, *18 (S.D.N.Y. Dec. 28, 2011). Even if an assignor and an assignee are all owned or managed by the same entity, an assignor cannot rely on this "ultimate ownership" as a basis to establish standing. *See Clarex Ltd.*, 2012 U.S. Dist. LEXIS 147485, at *18. This is because "[c]orporate form matters." *Id.* Where the assignor and assignee are "distinct legal entities," their "separate nature cannot simply be ignored when inconvenient." *Id.*

"It is black-letter law that one corporation cannot assert an affiliate's legal rights." *Id.* (collecting cases); *accord 42-50 21st St. Realty LLC v. First Cent. Sav. Bank*, No. 20-CV-5370 (RPK) (RLM), 2022 U.S. Dist. LEXIS 62429, *39 (E.D.N.Y. Apr. 4, 2022). "When a corporation 'desires the legal benefits to be derived from organization of a[n] [affiliate] that will function separately and autonomously in the conduct of its own distinct business, the [corporation] must accept the legal consequences, including its inability later to treat the [affiliate] as its alter ego because of certain advantages that might thereby be gained.'" *42-50 21st St. Realty LLC*, 2022 U.S. Dist. LEXIS 62429, at *40 (quoting *Nature's Plus Nordic A/S v. Nat. Organics, Inc.*, 980 F. Supp. 2d 400, 409 (E.D.N.Y. 2013) (quoting *In re Beck Indus., Inc.*, 479 F.2d 410, 418 (2d Cir. 1973))). "In other words, a corporation cannot 'have it both ways.'" *Id.* (quotation omitted).

Neither party disputes that the Court properly considered the language in Section 6.10 to conclude that ASG assigned its rights in this matter to the Sellers. As the Court previously noted, ASG gave the Sellers the "exclusive right" to "take all actions" with respect to the litigation with Defendants, and the Sellers would be liable for the "sole cost and expense" of the litigation. *See* Dkt. No. 79 at 7-8 (quoting Dkt. No. 75-2 at § 6.10). Because this language is

clear and unambiguous, and it manifests ASG's decision to transfer those rights to the Sellers without further action on ASG's part, the Court finds that it did not err in concluding that ASG assigned its rights to the Sellers.

After finding the "clear assignment to the Sellers," the Court stated the following:

. . . Defendants fail to recognize that the Sellers are identified in the preamble as BII's owners. Since the Sellers owned 96% of BII, and BII – through BO[C] and BHC – owned Plaintiff ASG, then it follows that Plaintiff merely assigned those rights to itself, or, in other words, it retained them. Therefore, the Court finds that Plaintiff ASG retained its rights and liabilities in this litigation; and, as such, the Court denies Defendant[s'] motion to dismiss for lack of subject-matter jurisdiction on this basis.

See id. at 8.

The Court finds that this latter finding - that "ASG retained its rights and liabilities in this litigation" - was a "clear error" of law. As the caselaw recited above makes apparent, when one entity assigns its rights to another, that assignment extinguishes the assignor's rights; and, consequently, the assignor does not have standing to pursue a claim for violation of those rights. The Court in this instance essentially applied the "ultimate ownership" rule that the Southern District rejected in *Clarex* when it found that ASG essentially "assigned those rights to itself[.]" *See Clarex Ltd.*, 2012 U.S. Dist. LEXIS 147485, at *18. As the cases in this Circuit make clear, distinct legal entities are just that – distinct – and therefore one cannot obtain standing and assert claims on behalf of the other, no matter how "intertwined" the entities might be. Therefore, although the Sellers own 96% of the parent company that owns ASG's general and limited partners, the Court finds that they are each distinct legal entities from one another. Because ASG and the Sellers are distinct legal entities, the Court holds that ASG cannot assert the Sellers' rights in this matter.

Accordingly, as a consequence of this corporate structure, the Court concludes that it committed "clear error" in finding that ASG has standing as the Plaintiff in this case. After further considering the parties' arguments and the relevant caselaw, the Court therefore grants Defendants' motion for reconsideration of their motion to dismiss. In the interests of justice, however, the Court will afford Plaintiff twenty (20) days from the date of this Memorandum-Decision and Order as "reasonable time" to file a third-amended complaint and substitute the Sellers as Plaintiffs pursuant to Rule 17(a)(3) of the Federal Rules of Civil Procedure because they are the proper parties with rights that they may enforce in this litigation against Defendants.²

III. CONCLUSION

After carefully considering the entire file in this matter, the parties' submissions, and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendants' motion for reconsideration of their motion to dismiss for lack of subject-matter jurisdiction, *see* Dkt. No. 82, is **GRANTED**; and the Court further


ORDERS that, pursuant to Rule 17(a)(3) of the Federal Rules of Civil Procedure, Plaintiff shall have **twenty (20) days** from the date of this Memorandum-Decision and Order **to file a third-amended complaint substituting the Sellers as Plaintiffs in this action.** If Plaintiff does not do so, the Court shall grant Defendants' motion to dismiss Plaintiff's

² Rule 17 provides, in relevant part, that "[t]he court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest." Fed. R. Civ. P. 17(a)(3).

complaint for lack of subject-matter jurisdiction, *see* Dkt. No. 69, without further Order of this Court.

IT IS SO ORDERED.

Dated: May 16, 2022
Syracuse, New York



Frederick J. Scullin, Jr.
Senior United States District Judge